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Sternberg Enterprises Profit Sharing Plan
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U.S. BANKRUPTCY
DISTRICT OF ARIZONA

UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In Re:	In Proceedings Under Chapter 11
MORTGAGES, LTD., an Arizona corporation	Case No. 2-08-bk-07465 RJH
Debtor(s).	

OBJECTION TO ML MANAGER'S (1)NOTICE OF LODGING ALLOCATION MODEL TO BE USED WITH REGARD TO THE DISBURSEMENT OF PROCEEDS TO THE NEWMAN LOAN INVESTORS (2) NOTICE THAT ALLOCATION MODEL HAS GENERAL APPLICABLILITY TO ALL INVESTORSM And (3) MOTION TO APPROVE ALLOCATION MODEL MOTION FOR EVIDECIARY HEARING.; MOTION FOR EVIDENTIARY HEARING.: OBJECTION TO CONFIDENTIALITY ORDER

Sternberg Enterprises Profit Sharing Plan, ("Sternberg") objects to Ml Manager's (" Manager") allocation model for the reasons set forth below and pursuant to Rule 9014 of the Local Rules of Practice, United States Bankruptcy Court, District of Arizona requests an evidentiary hearing.

Failure to Give Notice and Insufficient Time to Respond.

Manager has chosen to utilize a proceeding concerning a loan, with a balance of $222,236 owned by three investors, that was paid according to its terms, to obtain Court approval of t according to its terms, to obtain court approval of its allocation model that has applicability to all investors. Each of the investors has not received actual notice of this proceeding. A pleading dealing with the disbursement of the proceeds of the Newman Loan is

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of its allocation model that has applicability to all investors. It is not clear that each of the investors has not received actual timely notice of this proceeding. A pleading dealing with the disbursement of the proceeds of the Newman Loan is designed to mislead persons not having an interest in the loan who may not be aware of the extent hat they will be affected by the Courts approval of the proposed allocation model. Fairness and considerations of Due Process requires that each person affected receive actual notice of this proceeding. In a companion pleading for a protective order that was granted ex party, filed by Manager together with Manager's motion, Manager acknowledged that its motion is subject to Rule 9014 of the Federal Rules of Bankruptcy Procedure. Such rule requires the motion to be served in the manner provided for service of a summons and complaint by Rule 7004. Manager has not complied. Manager filed a 34 page pleading concerning an allocation model that required Manager's consideration for at least six months. Less than 10 days to object, with an intervening three day holiday weekend is insufficient to begin to comprehend what is proposed and the import thereof and to prepare an objection. Manager's motion was filed without schedules.

Parties not bound by Courts previous rulings.

Manager is requesting that the Court approval of allocation model be binding on all investors. Most of such investors were not parties to the proceedings that resulted in the Courts 21, 2009 Memorandum Decision, the Order Approving the Grace Settlements, or the Final Declaratory Judgment in the Hawkins Adversary. The Allocation Model issue evidence was not taken in such proceedings. They are not precluded from raising same issues and presenting evidence in this proceeding. Issue preclusion bars relitigation of an issue of fact or issue: (1) that is identical to a fact or issue determined in an earlier proceeding, (2) was actually decided by a court in an earlier action, (3) the issue was necessary to the judgment in such action, (4) there was a final judgment on the merits, and (5) the parties were the same. [1]

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1 In re Everett Lopez v. Emergency Service Restoration, Inc. 367 B.R. 99 (BAP-9): In re Jayson Reynoso, Debtor, Frokfort Digital Services,Ltd. ;Henry Ihejirka v. Sara L. Kisler, United States Trustee, Trustee 477 F3d 1117 (CA9

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Request for evidentiary hearing.

Pursuant to Rule 9014-2 (b) of the Local Rules of Practice, United States Bankruptcy Court, District of Arizona, request is hereby made for an evidentiary hearing. The issues presented by Manager's Notice and Motion are fact intensive, complex and disputed an evidentiary hearing is required. This motion will be supplemented to comply with the rule.

Distributions and charges made to investors who did not transfer their loan interest to Loan LLC's are determined by their respective agency agreements.

Section 4.13 of the Plan as modified by paragraph U (3) of the Confirmation Order ("U 3") provides as follows: " Each Loan LLC will distribute funds to its members pro rata based on their respective membership percentages in such Loan LLC as set forth in the operating agreement for each of the loan LLC's. *Any Pass-Through Investor that does not transfer its fractional interest into a Loan LLC will receive its distribution pursuant to the Existing Agency Agreements* and other contracts which may be assigned to the ML Manager LLC. Before such distributions are made, Pass-Through Investors who retain their fractional interests in the ML Loans shall be *assessed their proportionate share of costs, and expenses of serving and collecting the ML Loans in a fair, equitable and nondiscriminatory manner*, and shall be reimbursed in the same manner as the other investors. (emphasis added).

Clearly the rules concerning distributions to pass through investors who do not transfer their interests to Loan LLC's ("Opt Outs") are governed by the Agency agreements and not the Manager LLC or Loan LLC Operating Agreements. This is verified paragraph U1 of the Confirming Order striking the words "*and will be deemed modified to conform with the terms of the operating agreements of ML Manager LLC and each Loan LLC*" from § 4.11 of the plan.

Nor are the Opt Outs subject to the obligations imposed upon the Loan LLCs pursuant to the Inter-borrower Agreement ("IBA"). The Opt Outs are not parties to the Inter-borrower

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; Henry Ihejirka, v Sara L. Kisler, United States Trustee, Trustee.477 F3d 1117(CA-9

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Agreement referred to by Manager and are not bound its provisions. Amounts received by the Opt Outs are determined by the Agency Agreements pursuant to § 4.13 of the Plan. On May 17, 2008, Keith Hendricks provided the proposed language for what became §U.3.of Plan confirmation order. " before such distributions are made, Pass-Through Investors who have retained their fractional interests in the ML Loans shall be assessed their proportionate share of costs and expenses of serving and collecting the ML Loans in a fair and equitable nondiscriminatory manner and shall be reimbursed in the same **manner pursuant to the imterborrower agreement** as the other investors". **(emphasis added).** Such language was rejected and omitted from U 3. See Sternberg Declaration Exhibit A.

This was recognized in § 2.3 of the IBA that provides

"2.3 Allocation of Certain Costs and Expenses. ..."To the extent that the Non-Conveying ML Note Holders can be required to pay and do pay their fair share of the Loan Costs and other costs funded with Loan proceeds under the Agency Agreements, the amount so paid shall reduce the amount to be allocated among the Loan LLCs for repayment purposes."

Provisions of the Inter-borrower Agreement.

The meaning of the words "proportionate share of costs and expenses in serving the loan" was discussed during and leading the negotiation of the § U.3 provision that was written by the plan proponent. A draft of the IBA was provided to explain how bankruptcy exit costs servicing fees were allocated between the Liquidating Trust and the Loan LLCs. See Sternberg Declaration Exhibit A. The provisions of the IBA that affect the consideration of Manager's Allocation Model are set forth herein. Because the proposed Allocation Model affects all investors including the Loan LLCs, Manager is contractually obligated to follow the IBA.

Paragraph 2.1 of the IBA provides for separate loan advances to be received by the liquidating trust and by the Loan LLCs.

"2.1 Advances. All **Advances** under the Loan will be **initiated by a Advance Request** signed by the Liquidating Trustee **on behalf of the Liquidating Trust and the ML Manager on behalf of the Loan LLCs,** and the Advance Request will request disbursement of a specific sum to each of the Liquidating Trustee and the ML Manager on behalf of the Loan LLCs." (emphasis added).

Paragraph 2.2 requires the specific allocation based on the purpose for which the money is drawn. Loan Advances may be made to the Loan LLC Group solely to pay for Servicing

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Costs and the Loan LLC Group's allocated portion of Professional Fees and Allocated Loan Costs, operating costs of the ML Manager and such amounts will be allocated to and become part of the Loan LLC Group's Allocated Loan Share. No amounts will be borrowed by the Loan LLC Group to pay any Loan LLC Separate Cost.

"2. Advances under the Loan.

2.2 Allocation of Loan Advances. ***Each Loan Advance will be specifically allocated and documented between the Liquidating Trustee and Loan LLC Group at the time advanced based upon the purpose for which the money is drawn.*** The funds allocated to each will be deposited in accounts held by the Liquidating Trustee and the ML Manager on behalf of the Loan LLC Group. *Advances under the Loan may be made to the Liquidating Trustee solely for the purpose of paying Claims Required to be Paid and Liquidating Trustee Costs and Expenses and such amounts advanced will be allocated to and become part of the Liquidating Trustee's Allocated Loan Share.* ***Advances under the Loan may be made to the Loan LLC Group solely to pay for Servicing Costs and the Loan LLC Group's allocated portion of Professional Fees and Allocated Loan Costs, operating costs of the ML Manager*** *and such amounts will be allocated to and become part of the Loan LLC Group's Allocated Loan Share*. **No amounts will be borrowed by the Loan LLC Group to pay any Loan LLC Separate Costs.** (emphasis added).

Loan LLC separate costs are defined within the definitions of the IBA as follows :

""Loan LLC Separate Costs" means costs and expenses which may be incurred by a Loan LLC other than Servicing Costs, Allocated Loan Costs and allocated portions of the Allowed Claims, which costs and expenses may include, without limitation, payment of real property taxes and insurance; repair and maintenance expenses on REO Property owned by a Loan LLC, fees of asset managers and consultants engaged for the Loan LLC, foreclosure costs on REO Property, costs and expenses incurred by the Loan LLC in conducting investigations of potential Causes of Action and Avoidance Actions owned by the Loan LLC and prosecuting actions against potential defendants at the trial level, in bankruptcy court proceeding and on appeal and costs incurred in achieving settlements and attempting to collect upon any judgments obtained, and litigation costs with a ML Borrower under an ML Note owned by the Loan LLC other than defending claims made by such ML Borrowers against individual members of a Loan LLC, and all other costs and expenses not specifically agreed to be paid from Loan Proceeds."

The IBA provided for an allocation of costs and expenses between the Liquidating Trust and the Loan LLC Group. The Loan LLC's share of the Profession fees was limited under the IBA to " Professional Fees that were expended solely to defend the holders of Fractional Interests from suits and other actions by ML Borrowers based on breaches by ML of the obligation by ML of the obligation to fund". Exit financing costs were shared between the Liquidating Trust and the Loan LLCs by each paying a percentage allocation of Origination Fees and other Loan closing costs based upon the amount of funds borrowed by each on the date of the first Advance. Interest payments, Extension Fees, Repayment Incentive Payments and Disposition Incentive Payments payment made under the Loan will be allocated between the

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Liquidating Trustee and the LLC Group in accordance with their then Allocated Loan Share at the time of such payment." Paragraph 2.3 of the IBA provides "

2.3 Allocation of Certain Costs and Expenses. Prior to the first Advance under the Loan, the Liquidating Trustee and the ML Manager shall agree upon a (i) preliminary dollar allocation of all Professional Fees between the Liquidating Trustee and Loan LLC Group, with the Loan LLC Group's dollar share being based upon best estimates of Professional Fees that were expended solely to defend the holders of Fractional Interests from suits and other actions by ML Borrowers based upon breaches by ML of the obligation to fund under ML's loan commitments or ML Loan Documents, which preliminary allocation will be revised when the Professional Fees are approved by the Bankruptcy Court, and (ii) a percentage allocation of Origination Fees and other Loan closing costs based upon the amount of funds borrowed by each on the date of the first Advance. Interest payments, Extension Fees, Repayment Incentive Payments and Disposition Incentive Payments payment made under the Loan will be allocated between the Liquidating Trustee and the LLC Group in accordance with their then Allocated Loan Share at the time of such payment...Prior to the first Advance, the Liquidating Trustee and the ML Manager shall jointly file with the Bankruptcy Court a schedule of allocated items which can then be determined."

The Liquidation Trustee and the Loan LLCs were responsible to repay their respective loan obligations.

2.4 "Responsibility to Repay Lender. The Liquidating Trustee and Loan LLC Group will be responsible, as between themselves, to repay to the Lender its then Allocable Loan Share at each point in time."

The liquidating Trust and the Loan LLCs, not Manager, provided required collateral, to the exit lender. The exit lender was to receive 70 % of the proceeds from the sale of or collection of the collateral for the repayment of the exit financing loan. This would result in amounts owed by the Liquidating Trust to the Loan LLCs or amounts owed by Loan LLCs to the Liquidating Trust. Paragraph 2.5 Of the IBA provided for this anticipated occurrence.

" 2.5 Overpayments and Repayments. To the extent that either of the Liquidating Trustee or the Loan LLC Group shall pay more than their Allocable Loan Share to Lender ("Overpaying Party") because of the requirements of the Loan Documents or otherwise, the overpayment ("Overpayment") shall be accounted for as a debt due to the Overpaying Party for underpayment ("Underpayment") from the other party ("Underpaying Party") which shall bear interest until repaid at the same rate of interest then borne by the Loan. To the extent that the Loan LLC Group is the Underpaying Party, the Loan LLCs will allocate the underpayment among the Loan LLCs in the ratio of their then Allocated Loan Shares to the total Allocated Loan Share of all Loan LLCs. In the event that the Underpaying Party is the Liquidating Trust or the Loan LLC Group, to the extent that funds are available to the Liquidating Trust if the Underpaying Party or from a Loan LLC if the Loan LLC Group is the Underpaying Party, from Net Proceeds from Disposition by such Underpaying Party, the funds shall first be used to pay off such Underpaying Party's share of the Underpayment owed based upon the Liquidating Trust or Loan LLC's Allocable Loan Share of Overpayment debt at the time the Overpayment was made prior to making any distributions under the Liquidating Trust to a Liquidating Trust Beneficiary or to the Members of the Loan LLC.

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Paragraph 2.6 of the IBA requires amounts collected by Manager as charges to be accounted for as belonging to the Loan LLC that owns the loan. Manager had no interest in the charges. In its capacity as Agent acted as a conduit between the entities.

"2.6 Accounting for ML Charges. The ML Charges received by the ML Manager shall be accounted for as belonging to the Loan LLC which owns the ML Loan which generated the ML Charge but the ML Manager may collect the ML Charges and use such funds to pay for Servicing Costs to the Servicer, to repay the Loan LLC Group's Allocated Loan Share and the other Loan LLCs shall repay their portion of the ML Charges so used to the Loan LLC generating the ML Charges based upon the ratio of such other Loan LLCs Allocable Loan Shares at the time of such payments of funds from such ML Charges."

Paragraph 3 of the IBA provided the rules for allocations among the Loan LLCs.

3. "Allocations Among the Loan LLCs.

3.1 Allocations of Certain Costs and Fees. Allocated Loan Costs and allocated portions of Professional Fees to be borne by the Loan LLCs will be allocated among them in the ratio of the principal amounts of their ML Notes on the date of filling of the bankruptcy by the Debtor. Loan proceeds drawn by the Loan LLCs will only be used for the purposes specified under Section 2.3 above and will not be used for Loan LLC Separate Costs."

Section 3.1 requires that loan proceeds not be used to pay Separate costs. Where do funds come from to pay such separate costs? From assessments!

Sections 3.2 and 3.3 describe the allocation of Servicing costs and the use and repayment of ML charges.

"3.2 Allocation of Servicing Costs. Servicing Costs will be allocated among the Loan LLCs by the ML Manager on a basis which it considers fair and reasonable taking into account which loans require more or less servicing services. A Loan LLC that has foreclosed upon a property and now has no ML Loan to service shall not be allocated full Servicing Costs from and after the date of foreclosure but shall pay a fair amount as determined by the ML Manager for ongoing remaining duties like tax payments, insurance payments, year end accounting and tax statement preparation and any distributions on funds to the members."

3.3 Uses of ML Charges and Repayment Allocation. Any ML Charges shall be allocated to the Loan LLC which generates the ML Charges but may be used to pay Servicing Costs or to pay the Loan LLC Group's Allocated Loan Share. To the extent used to pay Servicing Costs, such payments will be allocated for repayment among the other Loan LLCs on a basis that the ML Manager considers fair taking into account which ML Loans require more or less servicing services, and to the extent used to pay the Loan LLC Group's Allocated Loan Share, the amount will be considered an Overpayment to be allocated for repayment purposes among all of the other Loan LLCs on the basis of the ratio of their individual Allocated Loan Share to the total Allocated Loan Shares of all other Loan LLCs on the payment date, and in each case repaid to the Loan LLC making the Overpayment first prior to distributions to Members of the other Loan LLCs when funds are available for distribution to members of each of the Loan LLCs obligated to made such repayment.

3.4 Liability for Overpayments. Liability for repayment to one Loan LLC from the other Loan LLCs for any Net Proceeds from Dispositions paid to the Lender on a disposition by a Loan LLC, which shall be an Overpayment shall be allocated among all of the other LLCs in the ratio of their

individual Allocated Loan Shares on date of the payment to the Lender to the total of the Allocated Loan Shares of all of the other Loan LLCs on the date of payment. Each Loan LLC shall hold back Loan LLC Reserves prior to distribution to its Members of an amount estimated to be sufficient in the ML Manager's judgment to repay any repayment obligations of such Loan LLC to the other Loan LLCs or the Liquidating Trust when the Final Settlement is made between the Loan LLCs and the Liquidating Trust, and to pay such Loan LLCs other costs and expenses.

Losses incurred by Loan LLCs who have made uncollected overpayments to the exit Lender are bourn by each LLC in the ratio of their individual loan shares. This loss results from the failure of the Liquidating Trusts and other Loan LLCs to pay the exit financing lender and to perform under the IBA. Not being a party to or obligated under the IBA this is a loss that the Opt Outs never agreed to incur. Those losses are not "costs and expenses of serving and collecting the ML Loans" under § 4.13 of the Plan. Manager can not change this by simply reclassifying the Liquidation Trusts portion of the Bankruptcy costs and reallocating them to the ML Loans.

Principal and Agent's Agency Agreement Obligations.

Pursuant paragraph 1.a. (4) (a) of the Agency Agreements, and subject to Managers right to apply sums received to payment of costs and fees, Manager upon receipt of payments, is required to transmit the appropriate such payments to the Opt Outs. There is no language in any Agency Agreement that authorizes Debtor to borrow funds on any principal's behalf. There is no language in any Agency Agreement that authorizes Debtor to incur borrowing costs for any principal's benefit. There is no language in any agency agreement that authorizes Debtor to encumber any principal's interest in its loan investments as collateral for a loan.

Prior to and after the signing of the agency agreements Mortgages Ltd ("ML")did in never borrowed or incurred interest costs for any Pass-Through Investor in performing its duties as agent. Prior to and after the signing of the agency agreements Mortgages Ltd never directly or indirectly charged any Pass-Through Investor for interest charge that it may have paid. ML had no authority under the agency agreements to borrow on behalf of any principal and had no authority to incur or charge for borrowing costs. Consequently ML, and there Manager as

assignee, had no authority under any agency agreement to bind or subject any principal to the IBA. Indeed Manager did not purport to do so. §2.3 of the IBA signed by Manager provided :

> " 2.3 Allocation of Certain Costs and Expenses. …"To the extent that the Non-Conveying ML Note Holders can be required to pay and do pay their fair share of the Loan Costs and other costs funded with Loan proceeds under the Agency Agreements, the amount so paid shall reduce the amount to be allocated among the Loan LLCs for repayment purposes."

Manager can not be indemnified pursuant to paragraph 4 of the agency agreements for any liability or cost that it was not authorized to incur under the agency agreements. Sternberg's Agency Agreement as amended does not include such indemnification provision. See Exhibit C, a true copy of which is attached hereto. Moreover pursuant to the provisions of the IBA referred to above all expenses, costs, and losses are incurred by the Loan LLCs, not Manager. Manager can not factually establish that it will incur a loss for which it is to be indemnified.

Ambiguities and factual issues of interpreting the type of costs and expense Manager may charge under the agency agreements must be considered and determined in an evidentiary hearing. Evidence of ML's practice in making charges must be considered.

Insufficient Information to Determine Issues.

Manager provides an Allocation Model that it intends to have general applicability to all investors but provides no detailed information concerning how the model was created or the projected results of application. Backup data or schedules have intentionally not been provided. With this lack of information Manager expects a response and a ruling of the court. Without this information it is impossible determine whether Manager will be fulfilling its fiduciary duties as agent or complying with the business judgment rule. In so doing Manager breaches numerous fiduciary duties including that of disclosure. §§811 and 812 of Restatement (Third) of Agency, that requires Manager to provide its principals all material facts concerning the agency and to render accounts of money and property received and paid. It is not clear to what extent, if any, Allocation Model complies with the requirements of §§ 2.1 -2.6 and §§ 3.1-3.4 of the IBA. Not having the backup data regarding projected recoveries and costs and expenses one can not know

whether the assumptions made are reasonable or arbitrary and capricious. Discovery and an evidentiary hearing are required to determine the facts.

For example, Manager repayment of exit financing obligation and past and future servicing costs as 3% of the face of the ML Loans. One may question whether anticipated property recovery amounts reduced by separate costs will be less than 3%. Step 4 of Manager's Allocation Model provides for a reallocation for negative recoveries on some ML Loans. Insufficient information has been provided to determine whether negative recoveries can take place. Anticipate Property recoveries for each ML Loan is required. But Manager deems such information as confidential, It is hard to accept that the proceeds of the sale of any ML Loan property would provide, after the payment of selling and separate costs less that 3% of the original amount ot the loan. Without specifics one could not know whether proposed step 4 is appropriate or if appropriate the effect thereof.

Does The Allocation Model Satisfy Manager's Fiduciary Duties?

While Manager may be subject to the Business Judgment Rule regarding the operation of ML Manager LLC and the various Loan LLCs, the relationship between Manager and the Opt Outs is that of principal and agent. In such capacity Manager is a fiduciary and subject to higher standards.. §8 of The Restatement (Third) of Agency and the numerous cases dealing with agents duties are applicable. 2 This Court has recognized that the agent has a fiduciary duty. In the University & Nash decision , after granting authority the Court state" I do agree , of course, it has to be exercised with the interest of the investors and creditors primarily in mind, because *there is that fiduciary duty*" (emphasis added). The fiduciary duties are defined under Arizona

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1 2 Modern Pioneers Ins. Co. V Nandin 437 P2nd 658, 103 Ariz. 125.; Valley National Bank of Phoenix v Milmore 248 P 2nd 74074 Ariz. 290, Halderman v Gosnell Development Crop. 748 P 2nd 1209, 155 Ariz. 585.

law and in the Restatement (Third) of Agency §§ 8.01 et.seq. An evidentiary hearing is requested to determine whether the proposed allocation model violates those duties.

Such fiduciary duties include is the requirement that the agent inform and account to its principal. Instead of doing so Manager has applied for and obtained an ex-party Protective Order restricting information available to Manager's principals. Such order was obtained prior to the courts determination that an evidentiary hearing will held, prior to the parities knowledge as to who will object to Manager's proposed allocation model, without an attempt to confer with other effected parties. No discovery proceedings were commenced and there was no showing that there was annoyance, embarrassment, oppression, or undue burden or expense. Based on the confidentiality of what Manager thinks property recovery values are, restrictions should not be applied toward information related to actual and anticipated costs and expenses and the allocation thereof. Keeping in mind that Manager must establish asking prices for all properties, the Allocation Model provides for a 20% downside contingency and that it is impossible to come to a conclusion regarding the Allocation Model without a study of the anticipated recovery value of all properties the Court is requested to require the parties to confer or modify the protective order so that the allocation model matter can be heard fairly.

Payment Liquidating Trust Loan Costs and LLC Overpayment Losses Not Intended.

The language of § U3 was drafted by the Plan Proponent. In negotiating the language of § U3 Plan Proponent inserted language that attempted to modify Opt Outs obligation under their agency agreements by referring to the IBA. The requested language was: *"before such distributions are made, Pass-Through Investors who have retained their fractional interests in the ML Loans shall be assessed their proportionate share of costs and expenses of serving and collecting the ML Loans in a fair and equitable nondiscriminatory manner and shall be reimbursed in the same manner* ***pursuant to the imterborrower agreement*** *as the other investors".*(emphasis added). The evidence will show that this proposal was rejected because the intention was that the Opt Outs assume no liability under the IBA. See Sternberg's Declaration,

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Exhibit A. Nevertheless the IBA draft was provided in satisfy paragraph 4 of Sternberg's Objection to Confirmation of Official Investor's Committee's Plan of Reorganization that no information was provided concerning the issues related to the IBA. The IBA was a contemporary document that effects the interpretation of meaning of §4.13 of the Plan as modified. Although a confirmed plan is in the form of a judgment rendered by a federal court, it is akin to a contract and its interpretation is governed by state law.3 Under Arizona law, substantially contemporaneous documents are to be read together.4 When interpreting provisions of a contract which is reasonably susceptible to more than one meaning, the meaning which operates against the party who supplies the words is generally preferred.5 Manager's argument that the plan proponent not the Manager drafted the provisions has no merit. It is the words and the meaning of the Confirming Oder that we are interpreting and the meaning of that document is to be interpreted against the one who supplies the words.. Clearly exit cost and exit financing charges are to be allocated to the Liquidating Trust Losses because of failure to collect overpayments under the IBA are bourn by Loan LLCs. Costs and expenses payable by the Opt Outs are determined by the Agency Agreements. Manager's Allocation Model ignores this. An evidentiary hearing is requested.

Allocation Model Does Not Provide For Terminated Agencies.

Sternberg's agency was terminated effective February 7, 2010. On January 23, 2010, Sternberg instructed Manager to provide a prompt accounting of all costs, fees and expenses incurred to the effective date of termination. See Sternberg's Declaration Exhibit A and Termination Letter Exhibit B.. Paragraph 3.g Sternberg's Agency Agreement as amended provides " *Upon the effective date of termination, assignment or delegation under d., e., or f.*

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3 Hills Motors, Inc. v Hawaii Auto Dealers' Ass'n 997 F2nd 588, 588 (9th Cir. 1993)
4 Phoenix title Trust Company v. Stewart, 337 F2nd 978; Childers Buick Co v. O'Connell, 11 P 3rd 413, 198 Ariz. 454
5 Sutter Home Winery Inc., v Vintage Selection Ltd., 971 F 2d 401 (CA-9); Kingman Water Co. v US 253 F 2d 588(CA-9); Jones v Bank of America N.A. 31 F Supp 828.;

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above, the rights and duties of Mortgages Ltd. will cease as to all rights or duties terminated or all rights or duties covered under the assignment or delegation if assignment or delegated and Beneficiary shall immediately reimburse Agent for any and all fees, costs, advances and compensation due." (emphasis added). See Global Amendment to Agency Agreement Exhibit C. Manager has not provided an accounting. Manager's Allocation Model has not addressed the termination. Other Opt Outs have claimed that they have terminated the agency relationship. Such issue has not been addressed.

Business Judgment Does Not Permit Manager to Breach Agency Agreements.

§ 4.13 of the Plan requires Manager to make distributions to the Opt Outs pursuant to the provisions of the agency agreements. § 1.a.4. of the agency agreements, and agent's fiduciary duties require prompt distribution of funds received. The fact that Manager may exercise is business judgment does not authorize a breach of the agency agreement nor does it authorize a breach of Manager's fiduciary duties. At a hearing of the factual issues concerning Manager's proposed allocation model, it will be proven that Manager's Allocation Model is merely an attempt to obtain Court authorization to allow such breaches to occur.

Agency Agreements and Plan Contemplated That Only Costs and Charges Related to Specific Loan Be Charged.

The evidence will establish that pass through investors selected specific loan investments and that the agency agreements contemplated that each loan would stand on its own. Distributions from one loan were not intended to be effected by any other loan. The evidence will establish that nothing in the Plan was intended to change that. Depositions of the financial advisors and the parties negotiating and/or drafting the Plan, Disclosure, Confirmation Order, Inter-borrower and exit financing documents will establish this. The wording of § 4.13 of the Plan, "assessed their proportionate share of costs, and expenses of serving and collecting the ML Loans" meant each loan separately. The evidence will establish that there was a reason for establishing separate LLCs and § 3.2 of the IBA agreement meant what is said.

Loss From Liquidation Trust's Failure To Pay Lender.

Advances received by the Liquidating Trust pursuant to §§ 2.1 and 2.1of the IBA that were not repaid to the exit lender are not "costs, and expenses of serving and collecting the ML

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Loans". They are losses to be allocated among the loan LLCs. Testimony at an evidentiary hearing will establish this. Manager can not exercise its "Business Judgment" to change this. Manager's Allocation Model may be inconsistent with this requirement. The same is true for any loss sustained because of a LLC's failure to pay its share of the exit financing obligation. These losses are the result of the LLC's providing their loan interests as collateral for the exit financing, something that the Opt Outs were not required to do.

Allocation Model Does Not Provide For Assessments Prior to Distribution.

Manager has not provided a valid explanation justifying its refusal to assess Opt- Out investors for cost incurred and using the proceeds to pay down exit financing debt. Such assessment would result in no loss to those who do not pay a prior to distribution assessment because the use of assessed amount to pay down the exit financing would reduce the amount of interest pai. Moreover such pay down may keep the exit financing loan out of default and therefore may be a benefit. Manager does have a fiduciary duty to act in the best interests of the investors.

§ 4.13 of the Plan deals with distributions to the Opt-Outs, it does not preclude assessments prior to distribution. Indeed § II.D. of the Disclosure Statement discussing the Pas-Through Investor that does not convey its Loan interest to a Loan LLC provides "*however the costs of enforcing the Loan and the expenses related to that Loan will be assessed against the Pass-Through Investors as provided for in the existing documents. The benefits and protections of the Loan LLC and the use of the Exit Financing will not be available to such Pass-Through Investor". (emphasis added).* Moreover § 2.2 of the IBA prohibits exit loan proceeds to be used to pay Loan LLCs separate costs. Manager should be required to explain where funds for separate costs will come from.

To justify Manager's failure to make assessments Manager argues that making assessments is not practical because like making an assessment for property taxes those who pay their share of the property tax will still have a lien on their property for the unpaid portion of the

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tax.. Opt-Out Investors' interest in the ML Loans are not subject to the exit financing lien The tax analogy is inapplicable.

An evidentiary hearing is required to determine whether the allocation model should include assessments of the Opt-Outs and payment of the exit financing.

Issues Requiring an Evidentiary Hearing

Issues of fact or law concerning Managers proposed allocation model include to the following:

What were the negotiation discussions leading to the amendment to §4.13 of the Plan and how do those discussion effect the interpretation of such Section/ .

Whether Manager's authority to make assessments pursuant to §4.13 "prior to distribution funds", was intended as a grant manager the absolute authority to refrain from making assessments before funds were available for distribution.

Does Manager have a fiduciary duty to allow Opt Outs to pay their assessments prior to final distribution of sale proceeds?

In its efforts to persuade Pass-Through Investors to transfer their interests to Loan LLCs has Manager made statements to Pass-Through Investors that it will require Opt Outs to pay assessments because they could not make use of borrowed funds?

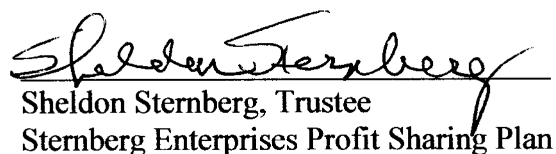
What representations did the Plan Proponents make concerning cost allocations to the Liquidating Trust and the ability of the Liquidating trust to pay its share?

What representations were made by the Plan Proponents concerning its following of the cost allocation provisions of the IBA.

What representations were made by Plan Proponents concerning the allocation of Bankruptcy costs?

What is the basis for the holdbacks within the allocation plan? Is it being conservative? Or is it an unsubstantiated excuse for Manager's breach of the agency agreements? For example,

1 Manager identified a cost of 3% of face amount of the notes, yet it withheld 20% from the
2 Newman Note Holder.
3 Did ML and the investors intend that the agency agreements authorize ML to charge
4 costs of one ML loan to investors who participated in another loan? Has ML ever done so?
5 Did ML and the investors intend the agency agreements to authorize ML to borrow funds
6 for the servicing, collection and administration of any loan? Has ML ever done so?
7 Did ML and the investors intend the agency agreements to authorize ML to charge
8 interest it paid on a loan made to operate its business, back to the investors as a reimbursable
9 cost? Has ML ever done so?
10
11 Did ML and the investors intend the agency agreements to authorize ML to charge
12 investors for its general administrative expense? Has ML ever done so? If so was it intended that
13 the charge would include anticipated future administrative expense after the agency function was
14 concluded?
15 Does the § 4.13 language "costs and expenses of serving the loan" include losses suffered
16 by Loan LLCs because the Liquidating Trust and other Loan LLCs could not repay their share of
17 the exit financing loan?
18 **Conclusion.**
19 An evidentiary hear should be required, adequate disclosure should be required and the
20 court should determine all the issues.
21
22
23 DATED this 13th day of September, 2010
24



25 Sheldon Sternberg, Trustee
26 Sternberg Enterprises Profit Sharing Plan
27
28

Copies of the foregoing via e-mail
This 14 th day of September, 2010 upon

Fennemore Craig.,P.C.
Cathy L. Reese Esq.
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3003 N. Central Avenue, Suite 2600
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Attorneys For ML Manager LLC
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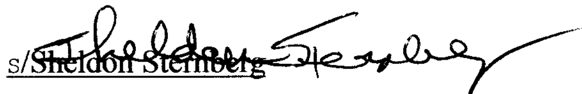

s/Sheldon Sternberg

EXHIBIT A

Sternberg Enterprises Profit Sharing Plan
Sheldon H. Sternberg, Trustee
5730 N. Echo Canyon Drive
Phoenix, Arizona 85018
Telephone: 602-808-9884
Facsimile: 602-808-9074
Email: ssternberg@q.com

UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In Re: FOOTHILLS PLAZA IV, L.L.C. corporation Debtor(s).	In Proceedings Under Chapter 11 Case No. 2-09-bk-028417- GBN **DECLARATION OF SHELDON H. STERNBERG**

I, Sheldon H. Sternberg, state under penalty of perjury under the laws of the United States of America, as follows:

1. I am a resident of Maricopa County, Arizona. I am over the age of eighteen and am competent to testify to the matters set forth herein.

2. I am a Trustee of the Sternberg Enterprises Profit Sharing Plan hereafter (referred to as the "Sternberg Plan"), owner of fractional interests in three loans originated by the Debtor.

3. The Sternberg Plan has elected not to transfer its fractional interests to any Loan LLC formed to acquire such interest pursuant to the provisions of Debtor's Reorganization Plan.

4. As Trustee of the Sternberg Plan, I attended a meeting with a representative of Mortgages Ltd in October of 2004, for the purpose of reviewing and signing two documents that were prepared by Mortgages Ltd. The first was a Master Agency Agreement with an effective date of December 21, 2004 (referred to as the "Agreement") and the other was the Global Amendment to Agency Agreements, dated October 6, 2004 (referred to as the "Amendment").

5. At our meeting we reviewed the Amendment, the Agreement and the prior agency

agreement to verify that the paragraph references in the Amendment made to both agency agreements were correct.

6. I was told that the references as to both the Agreement and the prior agreement were required because the Agreement had a future effective date. I was told that the references to the prior agency agreement in the Amendment applied to the prior agreement until the effective date and that the references to the Agreement in the Amendment would apply to the Agreement after the effective date.

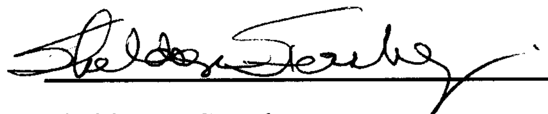
7. I signed the Agreement and the Amendment at the same time in the presence of Mortgages LTD's representative. Mortgages LTD's representative signed the Agreement at the same time at that meeting. Scott Cole was not in the building and his signature to the Amendment was obtained shortly thereafter.

8. Subsequent to that meeting I signed no agency agreement, subscription agreement or other document modifying the terms of the Master Agency Agreement effective December 21, 2004, as amended.

9. The letter attached as Exhibit A to the Sternberg Plan's Supplemental Memorandum for Motion to Disqualify ML Manager, is a true copy of a letter providing a notice of termination of the agency, I sent to ML Manger and ML Managers legal representative via email mail on January 23, 2010.

10. Attached as Exhibit B to Sternberg Plan's Supplemental Memorandum for Motion to Disqualify ML Mana ger, is a true copy of the email I sent on January 23, 2010, and the response thereto from Keith Hendricks, ML Manager's attorney, that effectively acknowledged the receipt of the January 23, 2010 letter.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. If call to testify, I would testify as I have stated in this declaration.



Sheldon H. Sternberg

EXHIBIT B

Sternberg Enterprises Profit Sharing Plan
5730 North Echo Canyon Drive
Phoenix, AZ 85018
Phone: 602-808-9884
Fax: 602-808-9074
Email: ssternberg@q.com

January 23, 2010

ML Manager LLC
Attn: Mark Winkleman
14050 North 83rd Avenue
Peoria, AZ 85381

Via Fax: 623-234-9560
Via email:mwinkleman@mtgltd.com
khendric@fclaw.com

Re: Notice of Termination of Agency

As a result of the overwhelming number of breaches of your duties as Agent for the Sternberg Enterprises Profit Sharing Plan (the "Plan"), the Plan hereby notifies you of the Plan's termination of the Master Agency Agreement as amended. Pursuant to paragraph 3.d. thereof, the termination is effective fifteen days from your receipt of this letter. Additionally you are instructed pursuant to paragraph 3.f of said Agreement to assign and deliver possession of all documents evidencing and representing ownership of the Plan's loan interests, to attorney Susan Gilman Esq., at 6540 North 40th Place, Paradise Valley, AZ 85253.

Contrary to your assertions, the Master Agency Agreement and Global Amendment thereto were signed contemporaneously prior to the effective date. Specifically, the Plan signed both documents simultaneously and the Master Agency Agreement was signed for Mortgages Ltd. at the same time. Scott Cole signed the Global Amendment later after Susan Gilman's signature was obtained. It is clear from the Global Amendment that its provisions applied to the prior Agency Agreement prior to the effective date and to the Master Agency Agreement after the effective date. It is also clear from the Global Amendment and the Amendment to the prior Agency Agreement that the provisions of such amendments were intended to apply to all subsequent Agency Agreements. Moreover paragraph 7.e. of the Master Agency Agreement applies to "prior agency agreements" not to a document that amends the Master Agency Agreement itself. Stated differently the Global Amendment is not a "prior Agency Agreement".

The Plan has identified 15 separate duties that have been breached in numerous occurrences. Each breach is material and justifies any principal's termination of the agency relationship including those principals who do not have a contractual right of termination.

Pursuant to paragraph 3.c. of the Master Agency Agreement, you are instructed to provide a prompt accounting of all costs, fees and expenses incurred to the effective date of termination.

Notwithstanding the termination of the agency, it is the Plan's intention to meet with you to ascertain all matters of disagreement and attempt to resolve them. Moreover it is the Plans intent to co-operate regarding the collection on the notes and guaranties the Plan has interests in and the foreclosure of the collateral.

Sincerely,

Sheldon H Sternberg, Trustee,
Sternberg Enterprises Profit Sharing Plan

EXHIBIT C

STI5

Global Amendment to Agency Agreements

October 6, 2004

This amendment is intended to modify the terms of all current and future Agency Agreements by and between Mortgages Ltd., an Arizona corporation and the following:

- Sternberg Enterprises Profit Sharing Plan
- Sheldon H. Sternberg, P.C., an Arizona corporation
- The Sylmar Sales Profit Sharing Plan
- Susan R. Gilman and Eli S. Gilman, wife and husband, as community property with right of survivorship
- Susan R. Gilman, a married woman dealing with her sole and separate property
- Desert Canyon Development Corporation, an Arizona corporation
- Susan R. Gilman, Trustee of the Alexander James Gilman Irrevocable Trust

For the purposes of this Amendment those Agency Agreements with a Paragraph 1 heading of **APPOINTMENT, TERMINATION, ASSIGNMENT AND DELEGATION** will be considered the "Old Agreement" and those Agency Agreements with a Paragraph 1 heading of **APPOINTMENT AND AUTHORITY OF AGENT** will be considered the "New Agreement". If Mortgages Ltd. revises the New Agreement as to any future transactions, Mortgages Ltd. shall notify the parties prior to their execution thereof, and the same or similar amendments as set forth herein shall be deemed to be incorporated by this amendment as if such is a New Agreement with paragraph references changed accordingly.

Paragraph 1.a.(1)(b) under the New Agreement and **Paragraph 2.a.(b)** under the Old Agreement are hereby modified to read as follows:

In the event of a default in the loan, liquidate Beneficiary's investment in the Loan and transfer all of Beneficiary's assigned percentage ratio in the Loan to a new beneficiary.

Paragraph 1.d. under the New Agreement and **Paragraph 2.d.** under the Old Agreement are hereby modified to read as follows:

Sale of Interest. In the event Beneficiary owns less than 100% interest in any loan being serviced by Mortgages Ltd. under a Servicing Agent Agreement, Agent, in its sole discretion, may liquidate Beneficiary's interest provided that a default condition in the loan exists at the time of said liquidation. Upon payment to Beneficiary, Agent will, upon direction of Beneficiary, use its best efforts to reinvest any funds received by Beneficiary in a new Loan.

Paragraph 2.-ACCOMODATION under the New Agreement and **Paragraph 3.-ACCOMODATION** under the Old Agreement are hereby modified to read as follows:

Agent provides its services as an accommodation only, and shall incur no responsibility or liability to any person, including, but not limited to, Trustor and Beneficiary, excepting incidents of gross negligence, willful misconduct or fraud.

Paragraph 3.a. under the New Agreement and Paragraph 4.a. under the Old Agreement are hereby modified to read as follows:

Agent shall have the right to assign the collection account or resign as Agent at any time, provided that Agent notifies Beneficiary of such assignment or resignation in writing no less than 30 days prior to such assignment.

Paragraph 3.a.(1) under the New Agreement and Paragraph 4.a.(1) under the Old Agreement are hereby modified to read as follows:

In the event Agent assigns the collection account, Agent will deliver all Loan Documents, directions and account records to assignee, at which time Agent will have no further duties or liabilities hereunder excepting those for acts or omissions occurring prior to the assignment.

Paragraph 3.b. under the New Agreement and Paragraph 4.b. under the Old Agreement are hereby modified to read as follows:

In the event that the ownership of the Trust Property becomes vested in the Beneficiary, either in whole or in part, by trustee sale, judicial foreclosure or otherwise, Agent may enter into a real estate broker's agreement on Beneficiary's behalf for the sale of the Trust Property, enter into a management and/or maintenance agreements for management or maintenance of the Trust Property, if applicable, may acquire insurance for the Trust Property, and may take such other actions and enter into such other agreements for the protection and sale of the Trust Property, all as Agent deems appropriate. Notwithstanding the foregoing, Beneficiary may terminate this Agreement after it becomes the owner of the Trust Property by written notice to Agent and payment of the fees, costs and expenses incurred by Agent as provided herein.

The following is hereby added as Paragraph 3.d. to the New Agreement and Paragraph 4.d. to the Old Agreement:

Beneficiary reserves the right to terminate this Agency Agreement at any time upon fifteen (15) days written notice to Mortgages Ltd. of such termination date.

The following is hereby added as Paragraph 3.e. to the New Agreement and Paragraph 4.e. to the Old Agreement:

Beneficiary reserves the right to require Mortgages Ltd. to assign all of its rights and duties in this Agency Agreement to a Third Party at any time upon fifteen (15) days written notice to Mortgages Ltd. to make such assignment designating the Third Party.

The following is hereby added as Paragraph 3.f. to the New Agreement and Paragraph 4.f. to the Old Agreement:

Beneficiary reserves the right to require Mortgages Ltd. to assign specific duties covered under this Agency Agreement to a Third Party at any time upon fifteen (15) days written notice to Mortgages Ltd. to make such assignment designating the Third Party.

The following is hereby added as Paragraph 3.g. to the New Agreement and Paragraph 4.g. to the Old Agreement:

09/15/2010

Upon the effective date of the termination, assignment or delegation under d., e., or f. above, the rights and duties of Mortgages Ltd. will cease as to all rights or duties if terminated or all rights or duties covered under the assignment or delegation if assigned or delegated and Beneficiary shall immediately reimburse Agent for any and all fees, costs, advances, expenses incurred and compensation due.

Paragraph 4.a. under the New Agreement and **Paragraph 5.a.** under the Old Agreement are hereby deleted in their entirety.

Paragraph 5.d. under the New Agreement and **Paragraph 6.d.** under the Old Agreement are hereby modified to read as follows:

Breach. In the event that Beneficiary breaches this Agreement, by failing to perform or by interfering with the Agent's ability to perform under this Agreement, then Beneficiary shall pay Agent, within 30 days of written notice of breach, administrative fees, reasonable attorneys fees, costs, closeout fees and any other fees or charges owed to Agent as compensation hereunder, along with any additional damages incurred by Agent, whether actual, incidental or consequential. Likewise, in the event that Agent breaches this Agreement by failing to perform or by interfering with the Beneficiary's ability to perform under this Agreement, then Agent shall pay Beneficiary, within 30 days of written notice of breach, any damages incurred by Beneficiary, whether actual, incidental or consequential.

The following is hereby added as **Paragraph 6.h.** to the New Agreement and **Paragraph 7.h.** to the Old Agreement:

Notwithstanding anything herein to the contrary, Agent hereby gives its consent and approval to Beneficiary to disclose Confidential Information, including underwriting criteria or procedures and information about loans made and products offered, to persons who may be prospective clients of Agent for the purpose of introducing such persons to Agent's business and services or referring such persons to Agent as clients or potential clients.

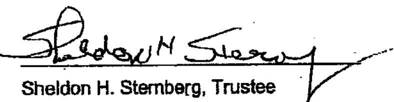
Paragraph 7.i. of the New Agreement only is hereby modified as follows:

The word "reasonable" is hereby inserted before the words "attorneys' fees".

This agreement may be executed in counterparts, and all counterparts constitute but one and the same document. This agreement is binding on the parties hereto and their successors and assigns.

BENEFICIARY:

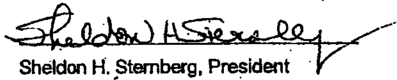
Sternberg Enterprises Profit Sharing Plan



Sheldon H. Sternberg, Trustee

BENEFICIARY:

Sheldon H. Sternberg, P.C., an Arizona corporation



Sheldon H. Sternberg, President

BENEFICIARY:

The Sylmar Sales Restated Profit Sharing Plan

Sheldon H. Sternberg, Trustee

BENEFICIARY:

Susan R. Gilman and Eli S. Gilman, wife and husband, as community property with right of survivorship

Susan R. Gilman

Eli S. Gilman

BENEFICIARY:

Susan R. Gilman, a married woman dealing with her sole and separate property

Susan R. Gilman

BENEFICIARY:

Desert Canyon Development Corporation, an Arizona corporation

Susan R. Gilman, President

BENEFICIARY:

Susan R. Gilman, Trustee of the Alexander James Gilman Irrevocable Trust

Susan R. Gilman, Trustee

BENEFICIARY:

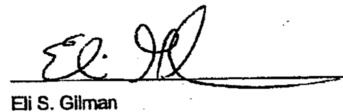
The Sylmar Sales Restated Profit Sharing Plan

Sheldon H. Sternberg, Trustee

BENEFICIARY:

Susan R. Gilman and Eli S. Gilman, wife and husband, as community property with right of survivorship

Susan R. Gilman



Eli S. Gilman

BENEFICIARY:

Susan R. Gilman, a married woman dealing with her sole and separate property

Susan R. Gilman

BENEFICIARY:

Desert Canyon Development Corporation, an Arizona corporation

Susan R. Gilman, President

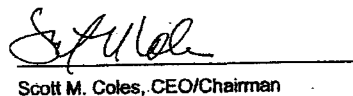
BENEFICIARY:

Susan R. Gilman, Trustee of the Alexander James Gilman Irrevocable Trust

Susan R. Gilman, Trustee

AGENT:

Mortgages Ltd., an Arizona corporation



Scott M. Coles, CEO/Chairman